United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7184-85

To be argued by
WILLIAM F. MCNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

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THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC. and HENRY GIRDWOOD,
Defendants-Appellants-Appellees.

P/S

Action No. 1.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,
and
HENRY GIRDWOOD,
Defendant.

Action No. 2.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS-APPELLEES IN ACTION NO. 1 AND DEFENDANT-APPELLANT-APPELLEE IN ACTION NO. 2, AS APPELLANTS

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Introductory Statement

The above-entitled actions, which were jointly tried, were brought to recover damages for personal injuries allegedly sustained by the plaintiff, Thomas J. Chiarello, in Action No. 1, when an automobile owned and operated by him was struck in the rear by a passenger bus owned by the defendant, Domenico Bus Service, Inc., and operated by the defendant, Henry Girdwood, one of its employees, and by his wife, the plaintiff, Angela Chiarello, the plaintiff in Action No. 2, to recover for the loss of her husband's

consortium. Although Girdwood was named a defendant in Action No. 2, he was never served with process in said action. The accident giving rise to said actions occurred in the State of New Jersey. Federal jurisdiction in both actions, which were brought in the United States District Court for the Southern District of New York, is based on diversity of citizenship.

The actions were tried twice before Hon. Charles M. Metzner and a jury in the District Court for the Southern District of New York.

The first trial resulted in an unanimous jury verdict in favor of both defendants in Action No. 1 and in favor of the defendant, Domenico Bus Service, Inc., in Action No. 2. On a post-trial motion made by the plaintiffs pursuant to Rule 50(b) and (c) and Rule 59 of the Federal Rules of Civil Procedure, however, the Court set aside the verdicts of the jury in each action on the ground hereinafter stated and ordered a new trial of the actions.

The new trial resulted in a judgment in the sum of $669,910.00 in favor of the plaintiff, Thomas J. Chiarello, and against the defendants, Domenico Bus Service, Inc., and Henry Girdwood, in Action No. 1, and in a judgment in the sum of $79,703.00 in favor of the plaintiff, Angela Chiarello, and against the defendant, Domenico Bus Service, Inc., in Action No. 2, from which judgments the present appeal is being taken.

The appeal by Domenico Bus Service, Inc., and Girdwood, in Action No. 1, and by Domenico Bus Service, Inc., in Action No. 2, bring up for review the order of the District Court setting aside the jury verdicts in favor of said defendants at the first trial (643a-644a) and the further order of the District Court denying the motion of said defendants that he disqualify himself from presiding at the retrial of the actions (658a).

The plaintiffs cross-appeal from the ruling of the District Court discounting at the rate of 3½ per cent the recovery allowed by the jury at the retrial for the future loss of earnings and future pain and suffering of the plain-

tiff, Thomas J. Chiarello, in Action No. 1, and for the future loss of consortium of the plaintiff, Angela Chiarello, in Action No. 2.

Questions Presented

The appeal by the defendants presents for review the following questions:

1. Did the District Court act arbitrarily or without legal justification in setting aside the jury verdicts in favor of the defendants at the first trial of these actions?

   The Court below impliedly answered this question in the negative (643a-644a).

2. Under the unusual facts of this case, should the District Judge Metzner have disqualified himself from presiding at the retrial of these actions?

   The Court below answered this question in the negative (658a).

3. Assuming *arguendo* that liability exists in these actions, are the verdicts in favor of the plaintiffs rendered at the retrial of these actions excessive?

   The Court below answered this question in the negative (1412a).

In the event that this Court answers Question 1 in the affirmative, Questions 2 and 3 will, of course, become purely moot or academic.

Accident

The accident herein admittedly occurred around 6:00 or 6:30 on the evening of June 30, 1972, which was a Friday evening, when a passenger bus owned by Domenico Bus Service, Inc., and operated by Girdwood, one of its employees, collided with the rear of a passenger car owned and operated by Chiarello on the access road leading from Bayonne, in the State of New Jersey, to the ramp of the

Bayonne Bridge connecting New Jersey and Staten Island. It is undisputed that there had been a very heavy rain storm that evening, which ended only minutes before the accident occurred. When the accident occurred Chiarello's car was standing on the roadway waiting for the traffic ahead of it, which was held up by a deep puddle that extended across the single-lane roadway, to move.

The front of the passenger bus owned by Domenico Bus Service, Inc., and operated by Girdwood, admittedly came into contact with the rear of Chiarello's car, causing it to be propelled forward on the roadway and to strike the rear of the car immediately in front of it. The impact of the collision between the front of the passenger bus and the rear of Chiarello's car could not have been a heavy one because it is undisputed that the only damage caused to the rear of Chiarello's car was a "Dented rear trunk and bumper" and a "broken right taillight" (884a).

The scene of the accident is shown in the photographs marked Plaintiffs' Exhibits 9, 10 and 11 at the retrial, which are reproduced opposite pages 1422a and 1424a of the Appendix herein. These photographs, which were received into evidence at both trials (the Exhibit numbers at the first trial were different), were taken by Chiarello himself with a Polaroid camera on the eve of the first trial in January, 1976, which accounts for the presence of the snow on the ground, and, according to Chiarello, accurately depict (except for the snow on the ground) the area where the accident occurred at the time it occurred (60a-63a, 66a-71a).

Except for the injuries allegedly sustained by Chiarello, the principal issue litigated at both trials was the claimed negligence of Girdwood in the operation of the passenger bus, which, as already noted, was submitted to the jury at the first trial as one of fact and resolved by the jury in favor of the defendants.

At both trials Girdwood testified that shortly before the accident occurred the bus had passed through a deep pool of water in the "dip" in the roadway under a railroad

trestle (shown in the background of Plaintiffs' Exhibit 1, which is reproduced opposite page 1422a of the Appendix) and that, when he applied the brakes of the bus after he passed this "dip" and saw the brake lights on Chiarello's car go on, the wheels of the bus "locked" and the bus, which was then about 75 feet behind Chiarello's car and was traveling at a speed of only about 20 miles an hour, skidded on the wet roadway (402a, 407a-410a, 1261a, 1272a-1273a).

Chiarello, the only other eyewitness to the accident called at each trial, claimed that, when Girdwood applied his brakes, the bus was traveling at an excessive rate of speed and was following his car too closely.

Decision Setting Aside the Jury Verdicts in Favor of the Defendants at the First Trial

At the close of the evidence at the first trial the plaintiffs moved for a directed verdict on the liability issue, on the ground that the accident was not an unavoidable accident, as claimed by Girdwood, but that the proof established as a matter of law that it was caused solely by the negligence of Girdwood in traveling at an excessive rate of speed and following his car "too closely." The Court, however, denied the motion, on the ground that "That's a question of fact for the jury" (538a)—which, as will hereinafter be demonstrated, it clearly was.

In thereafter submitting the cases to the jury the District Court—after admonishing the jury that "Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts" and "You alone determine the credibility of the witnesses, and the weight and effect to be given to the evidence" (588a), and that "the mere fact that an accident occurs is not evidence of negligence and does not mean that the plaintiffs are entitled to recover damages" (591a)—charged that before the plaintiffs could recover they must first establish "by a fair preponderance of the evidence" that "Henry Girdwood was negligent in the manner in which he operated the bus" (582a).

The jury thereafter unanimously found in favor of the defendants (610a-611a).

Following the entry of judgment in favor of the defendants, the plaintiffs moved for an order setting aside the verdicts of the jury and for judgment in their favor pursuant to Rule 50(b) and (c) and Rule 59 of the Federal Rules of Civil Procedure (617a-630a). Although the motion was vigorously opposed by the defendants on the ground that the claimed negligence of Girdwood in the operation of the bus presented a classic question of fact for the jury (631a-639a), the motion was granted by the Court to the extent of setting aside the jury verdicts in favor of the defendants and ordering a new trial of the actions. The opinion and order of the Court will be found at pages 643a-644a of the Appendix herein.

After reviewing some—but not all—of the pertinent proof adduced at the trial, District Judge Metzner held (644a):

> "Obviously, because of the narrow tolerances, we cannot with accuracy plot what happened. Giving the defendants the most liberal interpretation, the whole situation was just too close, in view of the conditions of the roadway at the time of the happening of the accident and the speed at which the driver admits he was going. The jury's verdict is predicated on the failure of plaintiffs to show that the bus driver was negligent. This finding is against the weight of the evidence and therefore must be set aside.
>
> So ordered."

Negligence Proof

If there were ever a negligence action where the issue of the defendants' negligence presented a clear-cut question of fact for the jury, it is submitted that the case at bar was such a case and that no one appreciated this more than District Judge Metzner, who denied the motion of the plaintiffs for a directed verdict at the close of the evidence at the first trial on the ground that the question of whether Girdwood operated the bus in a negligent

manner was "a question of fact for the jury" (538a).

The only eye-witnesses to the accident called at both trials were Chiarello himself, who was called by the plaintiffs, and Girdwood, the driver of the bus, who was called by the defendants.

On the date that the accident occurred Chiarello was employed as the superintendent for the loading and unloading of cargo at the Military Ocean Terminal in Bayonne, New Jersey, and at the time that the accident occurred he was on his way from his place of employment to his home in Staten Island (54a-55a). He was driving his own car, a 1972 Plymouth Valient Scamp, and was alone in the vehicle at the time (57a). He testified that, when he left his place of employment that evening there was a thunder storm" and a "Good heavy rain" but that the rain stopped shortly before he reached the point where the accident occurred (58a).

As already noted, it is undisputed that the right lane of the two-lane roadway leading from Hudson Boulevard (also known as Kennedy Boulevard) becomes a one-way access road leading to the ramp of the Bayonne Bridge just a short distance beyond the railroad trestle shown in the photograph marked Plaintiffs' Exhibit 1, which is reproduced opposite page 1422a of the Appendix herein, and that the left lane goes to Bayonne.

On the date that the accident occurred Girdwood had been driving trucks and buses for 20 years, the last 9 of which he had been employed as a bus driver for Domenico Bus Service, Inc. (397-398). Although he was driving tractor-trailer units at the time of the trial of these actions, he still drove passenger buses for Domenico Bus Service, Inc., on a part time basis (397a). On the evening that the accident occurred he was driving a 1965 General Motors passenger coach from the Port Authority Bus Terminal in New York City to Staten Island. The vehicle was 38 feet long, 8 feet wide and about 4½ feet high and accommodated 51 passengers (373a-375a). After leaving the Port Authority Bus Terminal in New York City, the bus proceeded to Hoboken by way of the Lincoln Tunnel and

then continued on to Bayonne, New Jersey, where it took the two-lane roadway leading to the single-lane access roadway to the ramp of the Bayonne Bridge, on which it is undisputed that the accident herein occurred. This single-lane roadway leading to the ramp of the Bayonne Bridge is shown in the photographs marked Plaintiffs' Exhibits 9, 10, 11 at the retrial of the action (1422a, 1424a).*

Girdwood testified that when the bus passed the "dip" in the roadway under the railroad trestle just before the accident herein occurred this portion of the roadway was "flooded" by the heavy rain storm that evening and that there was a large pool of water about 25 feet long and from "6 to 9 inches" deep in the "dip" (402a-403a). In fact, he testified that after a heavy rain storm this portion of the roadway is "usually flooded" (403a). Although Chiarello admitted that there was a "deep dip" about "four, five car lengths" long in the roadway under the railroad trestle and that after this "dip" the roadway is then on a "slight upgrade" to the point on the access road leading to the bridge where the accident occurred, he denied that there was a pool of water in the "dip" under the railroad trestle on the evening that the accident occurred (283a), thus creating a clear-cut question of fact for the jury on one of the most vital aspects of the plaintiffs' claim that Girdwood was negligent in the manner in which he operated the bus at the time that the accident occurred.

(a) Testimony of Chiarello at first trial

On his direct examination at the first trial of these actions Chiarello described the accident and the events leading up to its occurrence as follows (63a-64a):

> "Q. When you came out of this dip by the railroad trestle, would you tell us what you saw on that day?
>
> A. Well, if I might, I saw cars ahead of me in the bridge approach lane with their lights on, taillights, excuse me. Their taillights. The car ahead of me I

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* *At the first trial these photographs had different Exhibit numbers.*

saw was braking to a stop and I saw another car ahead of him attempting to go through or just starting to go through the puddle [referring to the puddle that stopped traffic on the single-lane access road to the bridge].

Q. When you saw this car ahead of you braking, what did you do?

A. Immediately started to brake myself.

Q. Can you tell me where the car directly ahead of you stopped with relation to the puddle?

A. I would say at least three-quarters of a car length prior to the puddle if not a whole car length prior to the puddle.

Q. Where did your car come to a stop behind this car?

A. About three-quarters of a car length behind him, sir.

Q. Would that be about ten feet?

A. Yes, I would say about that, yes.

Q. What happened after your car came to a stop?

A. When I came to a stop, I looked into my rearview mirror. It is normal for me, it always has been, when I stop, I look up to see what's behind me. I looked up and I saw the bus coming out of the dip and coming hard. He came up. I braced myself because I knew that something was going to happen. I braced myself and I was hit by the bus in the rear."

Chiarello testified that the impact of the collision when the front of the bus came into contact with the rear of his car caused the front seat of his car to collapse "backwards and that I fell backwards with it", so that "I was almost in a prone position" (64a-65a), and that, when his car was then propelled forward and struck the rear of the car in front of it, "I flew forward hitting my head on the visor" and that he came "to rest with my arms wrapped around the steering wheel" (65a). When he was asked how far the bus traveled "from the time you saw him coming out of the dip until he hit you", he testified, "Between, I would say roughly, a hundred to 150 feet" (71a), and, when he

was then asked "how much time elapsed from the time you saw him coming out of the dip until the time he hit you" he testified, "Just a few seconds, sir" (71a).

Chiarello testified that, after the accident, the bus driver came over to his car and asked him if he was "all right" and that he told him that, "I'm shaken, but I think so" (73a). Despite his claim that the herniated disc for which he was operated on in Florida the following year was sustained at the time of this accident, it is undisputed that Chiarello later got out of his car and went back to the bus and exchanged "licenses and information" with the driver of the bus (74a). When the front of Chiarello's car came into contact with the rear of the car in front of it, the impact of this second collision pierced the radiator of his car and caused all the water to run out of it. A Port Authority vehicle later pushed the car, with Chiarello in it, across the Bayonne Bridge and, when the car reached the Staten Island side of the Bridge, Chiarello called his home on the telephone and his brother in law came around in his car and picked him up (75a).

The balance of the direct examination of Chiarello at the first trial was devoted to his claimed injuries.

On cross-examination Chiarello testified that his car was traveling only "about 15 to 20 miles an hour" when he saw the brake lights on the car in front of him go on before it stopped at the puddle on the upgrade portion of the single-lane access road leading to the ramp of the Bayonne Bridge only seconds before the accident occurred and that, when he saw the brake lights on this car go on, he took his foot off the accelerator and, when this other car later stopped, he brought his car to a stop "about 10 feet" behind it (194a-195a). He claimed that the puddle on the single-lane access roadway leading to the ramp of the bridge, which caused the car in front of him to stop, was so large that the front and rear tires of the cars going through it were "both splashing up the water at the same time" (197a).

On re-direct examination Chiarello claimed that when his car traveled through this "dip" in the roadway under the

railroad trestle on the evening that the accident occurred, there was no more water there than there was on any other part of the roadway he had traveled over that evening (283a). His testimony in this regard, however, was sharply refuted by Girdwood (378a, 402a-403a).

To complete their *prima facie* cases on the liability issue at the first trial the plaintiffs read into evidence portions of the deposition of Girdwood, taken on his examination before trial herein on April 11, 1974 (371a-387a). In the portions of his deposition read by the plaintiffs Girdwood, after describing the bus he was driving and the route that he followed up to the point where the accident occurred (372a-375a), testified that while the bus was proceeding through the "dip" in the two-lane roadway under the railroad trestle, there was another vehicle following the bus on its left side, the front of which was just about where the engine of the bus was, which was in the rear of the bus (376a), and that it had "just stopped raining" and that there was a pool of water in the "dip" in the roadway under the railroad trestle and that the car ahead of him at the time, which was Chiarello's car, was about 75 feet in front of the bus before it entered the "dip" in the roadway under the trestle (377a-379a). He testified that this car was about 50 feet in front of the bus when he later saw its brake lights go on and that it traveled only about 25 feet after its brakes were applied and the accident occurred (379a-380a). When he was asked how fast the bus was traveling when the car in front of it applied its brakes, Girdwood testified, "About 25 miles an hour" (380a) and, when he was questioned about the accident itself, he testified that "the front bumper" of the bus came into "straight" contact with the rear of Chiarello's car (381a). He was then asked how fast the bus was traveling at the point where the accident occurred and he testified that "My wheels were completely [b]locked at the speed of 20 miles an hour" (382a). Although he couldn't say exactly within what distance he could stop the bus "completely", he thought he could stop it "in 30 feet in dry conditions" (382a) and that it "would take about

50 feet, roughly" to stop the bus completely "under the conditions that prevailed at the time and place of the accident" (383a). He was not, however, asked within what distance he could bring the bus to a complete stop on a wet roadway if the wheels of the bus "locked" when he applied the brakes, which, as the Court will see when it examines the record herein, is one of the crucial questions that was left unanswered at each of the two trials of these actions.

On his examination before trial, Girdwood further admitted that, after the accident, he got out of the bus and went over to Chiarello's car to ask Chiarello whether he was injured but he testified that by this time Chiarello was already out of his car and was walking towards the rear of the vehicle (383a). He testified that the radiator of Chiarello's car was leaking and that the rear of the car was "dented and the bumper was pushed in and the tail-light was broken", but he didn't observe any damage to the seat of the car (384a), and Chiarello appeared to be "shaken" by the impact of the collision (386a).

When Girdwood was asked on his examination before trial if he knew while the bus was "still in the dip that the cars in front of you were braking", he testified, "No, I didn't know they were braking until I got through [the dip] and seen it" (387a). He testified that there was a "bend" in the roadway just beyond the "dip" in the roadway which caused him to "momentarily" lose sight of the car in front of the bus and, when he was asked, "How much distance was there from the time you passed this point in the bend in the road to the point of the accident", he testified, "About 75 feet" (387a).

(b) Testimony of Girdwood at first trial

When he was called as a witness on behalf of his employer and himself at the first trial of these actions Girdwood testified on direct examination that, when the bus he was driving reached the "dip" on the roadway under the railroad trestle, which he estimated was on about a 25 degree downgrade, the "dip" was "flooded" with water

from the previous rainstorm (402a). As heretofore noted, he testified that the pool of water in the "dip" was about 25 feet long and from "6 to 9 inches" deep (403a). He further testified that he had been driving on this roadway five days a week for about two years and that every time he reached this "dip" in the roadway after a rain storm it was "usually flooded" because the drain sewers there were "clogged" (378a, 403a-404a). He estimated that the railroad trestle over the roadway had about 10 tracks on it and was about 100 feet wide and that, while the bottom of the "dip" was "relatively level", the roadway approaching it was on a 25 degree downgrade and that the roadway beyond it was "upgrade" (402a), which would naturally cause the rain falling on the roadway on either side of the trestle to flow down into the "dip" (404a).

Girdwood testified that he first observed the Chiarello car, which was then about 75 feet in front of the bus, when the car was going down the incline leading to the "dip" and that he also observed it going through the pool of water in the "dip" and that he followed it through the pool of water (406a). He placed the point where the accident occurred about "75 feet, 100 feet" beyond the railroad trestle (407a), which, as already noted, is shown in the background of the photograph marked Plaintiffs' Exhibit 1 (1422a).

On direct examination at the first trial Girdwood described the accident itself and the events leading up to its occurrence as follows (407a-410a):

> "Q. Now, sir, did you continue to keep Mr. Chiarello's vehicle in view?
>
> A. Yes, sir.
>
> Q. Was there any other vehicle ahead of Mr. Chiarello's vehicle?
>
> A. Yes, there was.
>
> Q. How many vehicles were ahead of Mr. Chiarello's vehicle, if you know?
>
> A. It was continuous traffic.
>
> Q. Did there come a time, sir, when there was an actual impact between your vehicle and Mr. Chiarello's vehicle?

A. Yes, there was.

Q. Could you tell us how far that was from the trestle?

A. 75 feet, 100 feet.

Q. Sir, was there anything in the roadway ahead of Mr. Chiarello's vehicle?

A. Yes, there was another car.

Q. And ahead of that, was there any other thing in the roadway, was there any obstruction of any sort?

A. There was a merge.

The Court: A what?

The Witness: A merge.

The Court: What's that?

The Witness: Another roadway coming onto the bridge from an opposite direction.

Q. Was there anything else in the roadway?

A. Just other vehicles. A puddle.

Q. A puddle?

A. Yes.

Q. How deep would you estimate that that other puddle was?

A. 3 or 4 inches.

Q. Sir, what did you actually observe with relation to Mr. Chiarello's car and the car ahead of you? What did you see just prior to the impact? What did you see?

A. The car ahead of Mr. Chiarello's car stopped and —momentarily, and proceeded—the car ahead of Mr. Chiarello stopped momentarily and then started up again, and then Mr. Chiarello's car stopped.

Q. Did you observe any signal lights in these vehicles?

A. Yes, I did.

Q. By that you mean the brake lights.

A. Brake lights.

Q. When you saw these vehicles apply their—saw the signal lights, at least, how far was the front of your vehicle from Mr. Chiarello's Car?

A. About 75 feet.

Q. At that time, had you gone through this puddle?
A. Yes, sir.

The Court: You mean the trestle dip?
Mr. Schultz: Yes, sir.

Q. This flooded condition under the trestle?
A. Yes.
Q. You had gone past there?
A. Yes sir.
Q. When you saw these brake lights going on, what did you do?
A. I applied my brakes.
Q. How far away from Mr. Chiarello's car were you when you put on your brakes?
A. About 75 feet, may—
Q. What—
A. 75, 60.
Q. All right.
At what speed were you going?
A. At 20 miles an hour.
Q. Would you tell us what happened with relation to your vehicle at that point? What happened?
A. It started to slide. The wheels locked and the vehicle would not stop on account of the wet roadway.
Q. Did your brakes operate properly?
A. Yes, they did.
Q. Were they wet?
A. Yes, they were.
Q. From this puddle?
A. Yes, sir.
Q. Did there come a time when your vehicle came into contact with Mr. Chiarello's car?
A. Yes, there was.
Q. Could you tell us at what rate of speed your vehicle was going when you came into contact with Mr. Chiarello's car?
A. Well, I had slowed down; about 7 or 8 miles an hour."

Girdwood testified that, after the collision, Chiarello walked back to the trunk of his car and bent down to lift

it up and that at that time, he gave no indication that he was injured (411a). He also denied that Chiarello said anything to him about being injured and he testified that, when Chiarello was questioned by the Port Authority police who arrived at the scene after the accident and asked him if he needed assistance, he stated that he was "all right" (412a). After the police arrived, Chiarello got back in his car and a police car pushed the car to the Staten Island side of the Bayonne Bridge (413a-414a).

On cross-examination Girdwood estimated that the bus was traveling about 25 or 30 miles an hour or the same speed as the other traffic on the roadway when it approached the "dip" in the roadway under the railroad trestle but that "I reduced my speed going down the ramp before we got to the puddle", referring to the pool of water in the "dip", because "I knew the puddle would be ahead" (416a-417a). When he was questioned about the brake "controls" on the wheels of the bus, he testified that they were about as high off the roadway as "the thickness of the tires, which were "About 9, 12 inches" in circumference (417a). He was then asked if he knew that "the slower the speed that you went through the puddle, the less the water would splash", and he replied that you will get the same amount of water in the brake drums whether "you go through fast" or "go through slow" (417a-418a). When he was asked if he accepted the "mathematical formula" that a vehicle traveling 20 miles an hour will travel "30 feet per second", he replied in the affirmative (427a). For reasons that are quite obvious, however, this commonly accepted formula cannot be applied to a vehicle that skids on a wet roadway because the wheels "lock" after the brakes are applied—which, it is submitted, is a factor that District Judge Metzner completely overlooked in subsequently setting aside the verdicts of the jury in favor of the defendants at the first trial of these actions.

On cross-examination Girdwood again testified, as he had previously done on direct examination, that he did not see the brake lights on Chiarello's car go on before the bus

entered the "dip" in the roadway under the trestle because "There is a bend in the road" at this point that momentarily obscured his view of the car, but he frankly admitted that after the bus came out of the "dip" there was nothing to obscure his view of the cars ahead of the bus (428a-429a). He again testified that, when the bus came out of this "dip", the car ahead of the bus, which was the Chiarello car, was then "About 75 feet" in front of the bus (428a). The "bend" in the roadway referred to by Girdwood, incidentally, is visible in the photograph marked Plaintiffs' Exhibit 1 (1422a).

When Girdwood was asked on cross-examination how far the bus would travel before it came to a stop if it was going 20 miles an hour and the brakes were applied as soon as he saw the brake lights on Chiarello's car go on, he at first testified, "I have no idea", although he admitted that, "It would be a matter of seconds" (430a-431a). At a later point on cross-examination when he was asked how far the bus going at a speed of 20 miles an hour on a "road that was not wet" would travel after the brakes were applied, he testified, "I'd say about 50, 60 feet" because the wheels of the bus will then "grab" (433a-434a). It would obviously take longer than this to bring the bus to a stop if the wheels "locked" when the brakes were applied and the bus then skidded on the wet roadway.

When Girdwood was then asked if the bus changed its direction in any way "from the time you applied your brake until your bus struck Mr. Chiarello's car", he testified "yes, I tried to steer into the curb" (431a).

Girdwood admitted that, when the front of the skidding bus came into contact with the rear of Chiarello's car, it propelled the car forward on the roadway for a distance of about 10 feet and into the rear of the car in front of it but he claimed that the bus itself moved forward only "About two, three feet" after the impact with Chiarello's car (436a-437a).

At the conclusion of their medical proof the defendants rested and renewed their motion for a dismissal, which

had been denied at the close of the plaintiffs' affirmative case, and the motion was again denied (536a). The plaintiffs moved for a directed verdict on the liability issue on the ground that it was clear from the testimony of Girdwood that he was either proceeding at an excessive rate of speed or following Chiarello's car too closely when he applied his brakes, but the Court ruled, "That's a question of fact for the jury" (538a).

Under a charge to which the plaintiffs took no exception and which was free from any substantial legal error (588a-606a), the jury rendered an unanimous verdict in favor of the defendants (610a-611a).

In concluding our discussion of the liability proof at the first trial, it should be observed that the record is devoid of any proof as to the pertinent New Jersey motor vehicle traffic regulations. Although the plaintiffs had requested that these regulations be included in the charge, the Court declined to do so on the ground that "you were told last November to have your charge in and you failed to do it" (607a). Consequently, the plaintiffs' claim at the first trial that Girdwood was negligent in the operation of the bus must be based solely on common-law principles of negligence.

(c) Decision Setting Aside Jury's Verdict in Favor of Defendants

The Court's written decision setting aside the jury's verdict in favor of the defendants and ordering a new trial of the action will be found at pages 643a-644a of the Appendix herein.

After reviewing the testimony of Girdwood (643a-644a), the District Court held (644a):

> "Obviously, because of the narrow tolerance, we cannot with accuracy plot what happened. Giving the defendants the most liberal interpretation, the whole situation was just too close, in view of the conditions of the roadway at the time of the happening of the accident and the speed at which the driver admitted

> he was going. The jury's verdict is predicated on the failure of the plaintiffs to show that the bus driver was negligent. This finding is against the weight of the evidence and therefore must be set aside."

In this connection, it will be recalled that Girdwood, the driver of the bus, testified both on his direct and on cross-examination that the bus was traveling only about 20 miles an hour when he applied the brakes and the wheels of the bus "locked" and that the bus then skidded on the wet pavement and that, that when it struck Chiarello's car, it was traveling only about 7 or 8 miles an hour. It is submitted that the 20 miles an hour that Girdwood testified the bus was traveling when he applied the brakes was not an excessive rate of speed even under the conditions prevailing at the time that the accident occurred. It is further submitted that a distance of 75 feet between the two vehicles was likewise not a dangerous interval for a bus about to mount an upgrade in the road to maintain under those same conditions. In any event, the jury could properly have so found, and undoubtedly did so find, at the first trial.

(d) Testimony at retrial

Except for the testimony of Patrolman John A. Hutchings of the Port Authority Police Department, who was not called as a witness at the first trial, the testimony on the liability issue at the retrial was virtually the same as that at the first trial. Since Patrolman Hutchings admittedly did not see the accident (880a), his testimony added little, if indeed anything, to the plaintiffs' case.

On direct examination Patrolman Hutchings merely testified that, when he arrived at the scene of the accident, he observed that the passenger bus operated by Girdwood had a "dented front fender" and that the only damage to the rear of the Chiarello car was a "Dented rear trunk and bumper" and a "broken right taillight" (884a).

Although he claimed on cross-examination that the two vehicles were standing on the roadway "I'd say 150 yards,

maybe" beyond the point where the railroad trestle was located (885a), he was in error on this point because Chiarello and Girdwood both placed the accident only about 100 or 150 feet beyond t' restle. (71a, 407a, 970a, 1269a). Patrolman Hutchings did not go back to observe the condition of the roadway at "dip" under the railroad trestle because he testified this was "Bayonne property" over which the Port Authority had no jurisdiction (886a). He admitted, however, that there was a "dip" in the roadway under the trestle, which he estimated was "Twenty feet, maybe" long (887a).

On re-direct examination Patrolman Hutchings identified the photograph marked Plaintiffs' Exhibit 9 as accurately representing the physical conditions existing on the access roadway leading to the Bayonne Bridge on the evening of the accident, except, of course, for the presence of the snow on the ground shown in this photograph (888a-891a), and he also identified the photograph marked Plaintiffs' Exhibit 11 as accurately showing, except for the snow on the ground, "the area where the accident occurred" (895a-897a), which, as the Court will see when it compares this photograph with Plaintiffs' Exhibit 10, is just a short distance beyond the point where traffic for Bayonne exits, thus making the roadway to the ramp of the Bayonne Bridge a single-lane roadway from this point to the bridge. When the witness was asked for the first time on re-direct examination if he saw any skid marks behind the bus when he arrived at the scene of the accident, he testified in the affirmative, but he was not asked how long these skid marks were or where they started (898a). It is submitted that these skid marks could well have been caused when, as Girdwood testified, the wheels of the bus "locked" after he applied the brakes and the bus then skidded on the wet roadway.

As already noted, the testimony of Chiarello and Girdwood at the retrial was substantially the same as their testimony at the first trial.

On his direct examination at the retrial Chiarello testified that, when his car left the railroad trestle on the

evening that the accident occurred, he saw the brake lights on the car about 75 feet in front of him on the access road to the ramp of the Bayonne Bridge go on and that he then took his foot off the accelerator of his car and later brought the car to a complete stop about 10 feet behind the car in front of him, which had come to a stop because of the puddle of water across the roadway at this point (688a-689a). In this connection, it should be noted that, if Chiarello maintained an interval of 75 feet between his car and the car immediately in front of him before applying his brakes, the jury at the first trial could very well have found that it was not unsafe for Girdwood to maintain the same distance between the bus and Chiarello's car as the bus approached the dip under the trestle, particularly in light of the undisputed fact that there was a "bend" in the roadway as the bus approached the trestle which momentarily blocked Girdwood's vision of the Chiarello car. Chiarello again testified that, just before he brought his car to a complete stop, "I looked up into my rear view mirror and I saw the bus enter the dip" under the railroad trestle (689a-690a). His own car was then "About 75 feet beyond the trestle" (690a), which, it is submitted, would place it more than this distance in front of the bus.

When Chiarello was asked when he saw the bus again, he testified (690a-692a):

> "A. When I had completely stopped. I looked back into my rear view mirror and I saw him coming out of the dip very, very fast and hard. He was coming hard at me.
>
> Q. What did you do at that time?
>
> A. I looked back to see if there was any way I could go, whether I could get my car off to the left or the right of the car in front of me, but it was impossible because on the left there is a low concrete retaining wall that separates down traffic off the bridge from the single lane going onto the bridge. On the right-hand side there is a high curb and there was no place to go, sir.

The Court: Is this a one-lane road?

The Witness: At the point of the accident, sir, just prior to there are two lanes, but one lane—the lane leaves you, it makes a left turn after a stop. There is only one lane going up onto the bridge.

The Court: That is the lane you were in?

The Witness: Yes. There is a big sign 'Bridge Traffic Lane Only.'

The Court: All right.

Q. What did you do after looking forward towards the roadway in front of you before the accident happened?

A. After I looked to see if I could find some place to go and I couldn't, I braced myself because I knew it was coming.

* * *

Q. Did you look back and see the bus still coming at that time?

A. I did.

Q. How was he coming at that time?

A. Hard and fast, very hard.

Q. Now, did this bus and your car ever come in contact?

A. Yes, sir, they did.

Q. And when they did, tell us what the contact felt like.

Mr. Schultz: Objection.

The Court: Overruled.

A. The bus hit me in the rear, flush in the rear. I was forced backwards against the back seat. The seat snapped. The safety lock on the seat snapped, letting the back of the seat fall flat with it. The force of his hitting me drove me into the back of the car that was still in front of me. When I hit the car in front of me I was propelled upwards into the visor just above the window and draped over the steering wheel and that's what I grabbed onto, like that (indicating), and jammed both feet onto the brakes again to stop the car."

On cross-examination Chiarello placed the accident at a point on the single-lane access road to the bridge about "100 to 150 feet" rather than "150 yards" beyond the railroad trestle, as claimed by former Port Authority patrolman Hutchings (970a) and he testified that it stopped raining that evening "Approximately five or six blocks prior" to the time that the accident occurred (968a).

Girdwood testified that the heavy rain storm that evening stopped anywhere from 15 minutes to half an hour before the accident occurred (1258a) and that the roads were still wet when the accident occurred (1259a). He estimated that the portion of the roadway under the railroad trestle, which was on a downgrade of from "20, 25, 30" degrees (1260a), was "roughly a hundred feet" long (1261a) and he testified that, when the passenger bus he was driving reached the "dip" in this portion of the roadway, which he claimed was "always flooded" after a rainstorm, there was a pool of water there "about 30 feet" long and "about eight, nine, ten inches" deep (1261a). When he was asked how fast the bus was traveling when it was going down the downgrade under the trestle and before it reached this flooded condition" in the "dip", he testified, "About 20 miles an hour" (1263a). At this point during the direct examination of Girdwood the defendants' counsel again sought to introduce into evidence, as he had attempted to do at the first trial, the photograph marked Defendants' Exhibit B for Identification showing the speed sign of 25 miles an hour on the single-lane access road leading to the ramp of the bridge, but the Court adhered to his previous ruling at the first trial excluding this important item of proof on the highly technical ground that the speed sign shown therein was located 25 or 50 feet beyond the point where the accident occurred (1269a-1271a, 1276a). Girdwood placed the point where the accident occurred on the single-lane access road to the bridge at "About 150 feet" beyond the flooded area in the "dip" under the railroad trestle (1269a) or at a point about "25 to 30 feet" beyond where the roadway starts to go up again after leaving the railroad trestle (1268a).

On direct examination he again described the accident itself as follows (1272a-1273a):

"Q. And, sir, when Mr. Chiarello brought his vehicle to a stop, how far was the rear of that vehicle, Mr. Chiarello's vehicle, from the front of your bus when you saw it come to a stop?

A. About 75 feet.

Q. What did you do then?

A. Applied the brakes.

Q. Where was your car at that point?

A. On the upgrade, sir, behind him.

Q. Had you passed through the flooded condition [referring to the large pool of water in the 'dip' under the railroad trestle]?

A. Yes, sir.

Q. At what speed were you going?

A. About 20 miles an hour.

Q. At that time, sir, where was this vehicle that you had told us was to your left rear?

A. He had gone straight, sir.

Q. What did your bus do when you applied the brakes, as you have told us?

A. The wheels locked and the tire (sic) skidded on the wet pavement.

Q. Did you attempt—withdrawn. Did you turn your vehicle in any way?

A. Yes, sir.

* * *

Q. What did you do with the wheels of your vehicle?

A. When I seen the bus was starting to slide I tried to steer it over to the curb to rub the wheels up against the curb. My right wheel did strike the curb and run along it for a distance, like the right rear.

Q. Did your vehicle come in contact with Mr. Chiarello's vehicle?

A. Yes, it did, sir.

Q. What speed was your vehicle going when you come into contact with Mr. Chiarello's vehicle?

A. It was almost stopped, sir. About seven or eight miles an hour.

Q. When you applied your brakes, sir, can you tell us what happened with the wheels of your bus?

A. The wheels locked, the wet pavement caused them to slide."

On cross-examination Girdwood emphatically denied that the speed limit at the point where the accident occurred was only 20 miles an hour, as claimed by Chiarello. He testified that it was 25 miles an hour (1284a). If the speed limit on this portion of the roadway was in fact only 20 miles an hour, the plaintiffs, who had the burden of proof on this point, could readily have established this by competent police evidence. For reasons best known to themselves and their attorney, however, they produced no such proof at either trial.

When Girdwood was confronted on cross-examination with his previous testimony on his examination before trial herein on April 11, 1974, that the bus was traveling "About 25 miles an hour" when he applied the brakes, he admitted that "if it's there, I said it", although he didn't "particularly remember" so testifying, but he still insisted that the bus slowed down to about "20 miles and hour" while it was passing under the railroad trestle because of the flooded condition that he encountered there (1286a). He identified the photograph marked Plaintiffs' Exhibit 10 (1424a) as accurately portraying (except for the snow on the ground) the conditions existing at the point on the single-lane access road to the bridge where the accident occurred on the evening that it occurred (1288a).

[illegible] the close of the evidence at the retrial the plaintiffs [illegible]d for a directed verdict on the ground that Girdw[illegible]'s testimony at the retrial was inconsistent with some of the testimony he had previously given on his examination before trial herein, where he admitted that his recollection was "more accurate" than it was at the time of the retrial, but the motion was denied by the Court on the ground that "the question of inconsistency is for the jury" (1327a).

The defendants then moved for a dismissal of the complaints of Chiarello and his wife on the ground that the proof failed "to show any actionable negligence on the part of the defendants" and further failed to establish that the accident was the "proximate cause of the injuries" claimed to have been sustained by Chiarello but this motion was also denied by the Court (1328a).

The issues in the two actions were thereafter submitted to the jury under a charge that was substantially the same as the charge at the first trial of the action (1384a-1399a) and the jury rendered a verdict in favor of Chiarello and his wife for the respective items of their damage claims in the amounts set forth in its answer to the damage questions submitted to it by the Court (1426a).

FIRST POINT

The District Court acted arbitrarily or without legal justification in setting aside the jury verdict in favor of the defendants at the first trial of this action.

It seems superfluous to say that, if the right to a jury trial is to be preserved as a part of our common-law heritage, a Trial Judge may not set aside a jury verdict merely because he disagrees with the result reached by the jury—which, it is submitted, is the only fair interpretation that can be placed on the decision of District Judge Metzner setting aside the verdict of the jury in favor of the defendants at the first trial of this action—despite his assurance to the jury during his charge that "I have no views on the facts of this case and you are not to assume that I have any such views" (561).

Nowhere in the Court's decision is there any suggestion that the undisputed testimony of Girdwood, the driver of the bus, that the wheels of the bus "locked" when he applied the brakes while the bus was traveling only about 20 miles an hour and that the bus then skidded on the wet pavement, was so improbable as to be incredible as a matter of law or was so incredible that the jury was not justified in giving credence to the same. On the contrary,

the Court itself negated any such suggestion as this by stating in his decision that he was giving the defendants the benefit of "the most liberal interpretation" of their proof—and, as already noted, the only accident proof adduced by the defendants was the testimony of Girdwood himself. If the jury at the first trial had accepted the undisputed testimony of Girdwood as to the circumstances under which the accident occurred—as it obviously did and, it is submitted, had every right to do—it was amply justified in finding in favor of the defendants because, in this event, it is clear that the accident would have been an unavoidable one that was due to no negligence or fault whatever on the part of Girdwood, the driver of the bus.

The burden of establishing that the accident was caused by some negligence on the part of Girdwood in the operation of the bus concededly was on the plaintiffs, and the Court so charged the jury at the first trial (592a). However, as this Court will see when it examines the record of the first trial, the plaintiffs offered no proof whatever to sustain this burden other than the testimony of Chiarello himself, their sole accident witness, who, in addition to denying that there was a pool of water in the "dip" in the roadway under the railroad trestle following the heavy rain storm that occurred that evening (192a, 269a), merely testified that before the accident occurred "I looked into my rearview mirror" and "I saw the bus coming out of the dip and coming hard" and "I braced myself because I knew that something was going to happen" and then "I was hit by the bus in the rear" (64a). If there had been no other proof as to how the accident occurred, Chiarello's testimony in this regard clearly would have raised an issue of credibility for the jury—particularly as respects his claim that there was no pool of water in the "dip" in the roadway under the trestle, as claimed by Girdwood. If, as Chiarello claimed, he had to bring his car to a stop just before the accident occurred because there was a large pool of water on the "upgrade" portion of the access roadway where the accident occurred, which held up the traffic in front of him, it is inconceivable that there was not also a large pool of water in the "dip" in the roadway

under the trestle, as Girdwood testified there was when the bus reached this portion of the roadway (378a, 402a-403).

But there was other proof in the case which clearly raised factual questions for the jury as to the claimed negligence of Girdwood.

Girdwood, whose testimony at both trials had all the earmarks of truthfulness, as well as of plausibility, testified that the bus was traveling about 25 miles an hour when it reached the railroad trestle on the evening that the accident occurred but that it slowed down to about 20 miles an hour when he came to the pool of water in the "dip" in the roadway under the trestle and that the bus was still traveling at this moderate speed when it emerged from the trestle and he then saw the brake lights on Chiarello's car go on (410a). He testified that Chiarello's car was then about 75 feet in front of the bus and that he immediately applied his brakes but that, when he did so, the wheels of the bus "locked" and the bus skidded on the wet pavement until it came into contact with the rear of Chiarello's car (409a-410a). He testified that at the moment of impact the bus was traveling only about 7 or 8 miles an hour (410a). If the heavy bus, carrying 51 passengers, had been traveling any faster than this when it came into contact with the rear of Chiarello's car, it certainly would have caused far greater damage to the rear of the vehicle than a dented rear fender and trunk and a broken taillight.

If the undisputed testimony of Girdwood as to how the accident occurred did not create a clear-cut question of fact for the jury on the issue of his claimed negligence in the operation of the bus, it would be difficult to imagine an automobile accident case where an issue of fact for the jury as to the negligence of the defendant would ever be created.

In an endeavor to discredit the testimony of Girdwood as to the circumstances surrounding the occurrence of the accident herein, at the trial the plaintiffs' counsel relied on the formula that a vehicle going at a constant

given speed travels roughly 1½ times its speed per second (1208a). It seems superfluous to say that this formula, which is applicable to ideal road conditions, can have no application whatever is a case where, like the case at bar, there is proof that when the driver of the vehicle applied his brakes, the wheels of the vehicle "locked" and the vehicle then skidded on the wet roadway. It is submitted that this is something that even the District Judge himself, who in his decision setting aside the verdicts of the jury in favor of the defendants at the first trial refers to the fact that "Defendants took no exception to plaintiffs' claim that a car going 20 miles per hour travels 30 feet a second" (644a), apparently overlooked completely in evaluating the undisputed testimony of Girdwood that, when he applied the brakes of the bus after passing through the deep pool of water in the "dip" in the roadway under the railroad trestle, the wheels of the bus "locked" and the bus then skidded on the wet roadway. It is immaterial that "Defendants took no exception to plaintiffs' claim that a car going 20 miles per hour travels 30 feet per second" (644a). The defendants were not required to take an exception to the claim of the plaintiffs' counsel in this regard, particularly where the claim is wholly inapplicable to the proof adduced at the trial.

Wholly apart from this, it is submitted that it was clearly the function of the jury and not the Court to evaluate the claim of the defendants that the accident herein was an unavoidable accident that was due to no negligence or fault of any kind on the part of Girdwood, the driver of the passenger bus.

Although the decision of the District Court purports to be based on the ground that the jury's verdict in favor of the defendants was "against the weight of the evidence", it is really based on the Court's conclusion that the issue of negligence in this case was "just too close" to be resolved by the jury, although the Court itself had previously—and, it is submitted, properly—denied the motion of the plaintiffs for a directed verdict on this issue on the

ground that "That's a question of fact for the jury" (538a).

From time immemorial it has been the function of the jury rather than of the Court to resolve issues of fact and the more closely or more sharply drawn these issues are, the more imperative it is that their resolution should be left to the judgment and experience of the jury as the final arbiter of the facts under our common-law system of jurisprudence. If, as the District Court seems to believe, an issue of fact is "just too close" to be resolved by a jury, then the jury system has failed completely and jury trials should be abolished altogether, or at least limited only to cases where the factual issues are not "too close".

Although the District Judge presiding at a jury trial in a Federal District Court has discretion in determining whether or not a jury verdict should be set aside, his discretion in this regard is not unlimited. The rule governing its exercise is well stated in Moore's Federal Practice, Vol. 6A, § 59.08[5], at pp. 59-160 and 59-161 (1973 Rel.), as follows:

> "The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial, consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The Judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been it is his duty to set the verdict aside, otherwise not."

This Court will read the decision of District Judge Metzner setting aside the verdict of the jury in favor of the defendants at the first trial of these actions in vain for any suggestion that the jury's verdict constituted a "miscarriage of justice". On the contrary, and as already noted, the Court, after finding that "we cannot with accuracy plot what happened," set aside the verdict on the wholly unprecedented ground that he believed that the

issue of the defendants' negligence, or, as the Court expressed it, "the whole situation," was "just too close" for the jury to resolve. If this were the fact, he should have dismissed the plaintiffs' complaint because, in this event, the plaintiffs clearly would have failed to establish their actions herein by a fair preponderance of the proof, which the law required them to do.

Also, see:

Berner v. *British Commonweatlh Pacific Airlines, Ltd.,* 346 F. 2d 532 (2 Cir., 1964), cert. den. 382 U.S. 983, 56 S.Ct. 599, 156 L. Ed. 2d 472 (1966);
Duncan v. *Duncan,* 377 F. 2d 49 (6 Cir., 1967);
Massey v. *Gulf Oil Corporation,* 508 F. 2d 92 (5 Cir., 1975);
Reed Brothers, Inc. v. *Monsanto Company,* 525 F. 2d (8 Cir., 1975).

Berner was a wrongful death action involving a passenger on a commercial airline who was killed when the plane crashed against a mountain near the San Francisco Airport, killing all the passengers, while the pilot was making an instrument landing. The pilot was charged with "wilful misconduct" under the Warsaw Convention. The case was tried in the District Court for the Southern District of New York and resulted in a jury verdict in favor of the defendant airline. The District Judge, however, set aside the verdict and granted the plaintiff's motion for judgment n.o.v., with a new trial as to damages and a new trial as to all the issues if the order granting judgment to the plaintiff were reversed on appeal.

In reversing the judgment of the District Court in favor of the plaintiff and directing that judgment be entered in favor of the defendant on the jury's verdict, this Court, writing through Circuit Judge Moore, stated at page 536 of its opinion:

> "The separate roles to be played by the jury with respect to the facts and by the court with respect to the law have been rather firmly settled for many generations. As the Supreme Court said in Tennant v.

Peoria & Pekin Union Ry., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944):

> 'It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [citing cases] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'

This admonition was re-emphasized in Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946):

> 'It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.'

> No useful purpose will be served by even a résumé of the many factual issues outlined in the court's charge or raised by the testimony set forth in great detail in the opinion of 86 pages. Suffice it to say that the trial court presented the factual issues to the jury in the charge, giving to them the broadest leeway to draw such inferences as to wilful misconduct as might be warranted. They obviously resolved the facts and inferences therefrom as not supporting wilful misconduct."

At a later point in its opinion the Court stated (pp. 541-542):

> "We have already held that there was sufficient evidence to go to the jury either under the governing Second Circuit standard or under Judge Ritter's lesser standard of wilful misconduct. To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case, see 6 Moore, Federal Practice ¶ 59.08(5), at 3817, 3820 (2d ed. 1953), but we find that it was in this case. In light of the possible inferences as to what actually happened when the pilot began his let-down, we cannot agree that, viewed in light of the proper standard, the verdict could be called against the weight of the evidence. Cf. Damanti v. A/S Inger, 314 F.2d 395, 398 (2d Cir.), cert. denied sub nom. Daniels & Kennedy, Inc. v. A/S Inger, 375 U.S. 834, 84 S.Ct. 46, 11 L.Ed.2d 64 (1963)."

Duncan involved personal injuries sustained by the plaintiffs, who were passengers in the defendant's car, when the car collided with a bridge. The case was tried in the United States District Court for the Middle District of Tennessee and, although there was testimony that the car was traveling 60 or 65 miles an hour at the time of the collision, the jury rendered a verdict in favor of the defendant, which the Trial Judge set aside and then ordered a new trial of the action, at which the plaintiffs prevailed. In

setting aside the verdict at the first trial, the Trial Judge stated "I am not too happy with the verdict in view of the evidence in the case. It impressed me during the trial that there was almost overwhelming evidence of negligence on the part of the driver" and "I am dissatified with the verdict. I think it is against the weight of the evidence, and I set the verdict aside and order a new trial of these cases on that ground" (p. 52).

In vacating the judgment in favor of the plaintiffs entered after the retrial of the action and remanding the case to the District Court with instructions to enter judgment in favor of the defendant on the verdict of the jury at the first trial, the Court of Appeals in the Sixth Circuit, after quoting from the holding of this Court in *Berner*, stated (p. 54):

> "Defendant's evaluation of the subject matter of this case as a 'prime example of subject matter lying well within the comprehension of jurors' is deemed accurate. The first trial lasted less than two days, and there has been no showing that the jury considered any matter not properly before it. Moreover, plaintiffs' case of negligence against defendant could not be characterized as strong and it is clear that the credibility of plaintiffs' witnesses was in issue. In this respect it must be remembered that, as the court correctly charged the jury, the burden of proof in establishing negligence was on plaintiffs. The jury was not required to impose liability on defendant on the basis of the testimony of his wife and aged mother-in-law, and the jury's verdict in the first trial was, at the very least, a reasonable one. Therefore, on the basis of this record, it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence.
>
> The fact that the second jury which heard the case returned a verdict in favor of plaintiffs, thus 'reinforcing' the decision of the district judge that the verdict for defendant was against the weight of the

evidence, is of no significance here. See Fassbinder v. Pennsylvania R.R. Co., supra. Even the most inexperienced attorney is aware of the fact that the outcome of any given case depends in large part upon the particular jury hearing it. As was stated in American Mfgrs. Mut. Ins. Co. v. Wilson-Keith & Co., 247 F.2d 249, 256 (8th Cir. 1957), there with reference to an alleged error of law, 'regardless of the different results in the trials, the function of this court is to review alleged errors and if [a party litigant] had become, in due course, vested with a valid judgment, they are entitled to have the action of the trial court which divested them of it reviewed for the alleged manifest error * * *.'

For the foregoing reasons, the judgment in favor of plaintiffs is vacated, the order granting plaintiffs a new trial is reversed and the case is remanded back with instructions that the verdict and judgment in defendant's favor be reinstated."

In *Massey* the Court of Appeals for the Fifth Circuit, in holding that an order of the District Court setting aside a jury verdict and ordering a new trial is reviewable under the abuse of discretion standard on an appeal from the final judgment in the action, held at pages 94-95 of its opinion:

"Our review of an order granting a motion for new trial is somewhat broader than review of an order denying a motion for new trial. In Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033 (CA5, 1970), drawing at length from Taylor v. Washington Terminal Co., 133 U.S.App.D.C. 110, 409 F.2d 145 cert. denied, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969), we pointed out that the operative factors underlying review of a ruling on a new trial motion are deference to the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record, deference to the jury's determination of weight of the evidence and quantum of damages, and the con-

> stitutional allocation to juries of questions of fact. We noted that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed. But where the judge has granted a new trial, the factors oppose each other. Deference to the trial judge is subjected to opposing tensions of deference to the jury as the body to whom fact finding is constitutionally allocated and deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial. O'Neil v. W. R. Grace & Company, 410 F.2d 908 (CA5, 1969)."

In so holding, the Court observed in *Footnote* 2 at page 94 of its opinion that it considered the phrase "abuse of discretion" in the context of its opinion to be "unfortunate" because "It means no more than that the court has clearly erred" in setting aside the verdict of the jury, citing 6A Moore, Federal Practice, § 59.08[6], at p. 59-175.

In *Reed Brothers, Inc.*, 525 F. 2d 486 (8 Cir., 1975), cert. denied, —— U.S. —— 96 S.Ct. 787, ——L.Ed. ——, which is the most recent Federal Court of Appeals case on this point, the Court of Appeals in the Eighth Circuit stated at page 499 of its opinion:

> "When a verdict is set aside because evidence was erroneously admitted or where the trial court has erred in instructing the jury, it is generally thought appropriate to uphold the granting of a new trial as being peculiarly within the discretion of the trial judge, since he is considered in a better position to correct a manifest injustice, 466 F. 2d at 186. A different

> situation exists, however, where the grant [of a new trial] is based on the district court's appraisal of the evidence, for we must ever be sensitive that the trial judge not interfere with the role of the jury as the trier of fact. In this regard, Judge Lay stated in *Fireman's Fund* [*Fireman's Fund Insurance Co.* v. *AALCO Wrecking Co.*, 466 F. 2d 179, 185-188, 8 Cir., 1972), cert. denied, 410 U.S. 930, 93 S.Ct. 1371, 35 L.Ed. 2d 592 (1973)]:
>
> > Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred (466 F. 2d at 187)."

It is submitted that no one who reads the record at the first trial of these actions can possibly conclude that the jury's verdict in favor of the defendants constituted a miscarriage of justice, nor did District Judge Metzner himself so find or even suggest.

Since the burden of proof in a negligence action is on the plaintiff, the courts of New York have for years held that a jury verdict in favor of the defendant should not be disturbed by the Trial Judge "unless it plainly appears that the evidence so preponderates in favor of the plaintiff that the verdict for the defendant could not have been reached on any fair interpretation of the evidence" (*Fogel* v. *Nelson*, 32 A.D. 2d 904 [1st Dept, 1969] and cases therein cited).

Although the Federal rule may appear to be more flexible than the New York rule, it is submitted that the simplicity and logic of the New York rule at least makes it impossible for the Trial Judge to set aside a jury verdict in favor of the defendant merely because he may disagree with the conclusion reached by the jury on a question of fact or on some other equally untenable legal ground.

As heretofore noted, by his own admission District Judge Metzner concluded that the verdict of the jury in favor of the defendants at the first trial of these actions was contrary to the weight of the evidence only because, in his opinion, the issue of the defendants' negligence was "just too close" to be resolved by the jury.

Extensive research has failed to disclose a single Federal case where a jury verdict in favor of the defendant in a personal injury action or in any other type of action has been set aside on this novel, and, it is submitted, wholly untenable, legal ground. The net effect of the order of District Judge Metzner setting aside the verdicts of the jury in favor of the defendants at the first trial of these actions was to give the plaintiffs a second chance to succeed before another jury, which might possibly view the evidence submitted to it in a different light than the jury at the first trial did. This was certainly not the intent of Rule 59 of the Federal Rules of Civil Procedure, which specifically limits the power of the District Court to set aside a jury verdict and to order a new trial to "any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States" (Rule 59(a)(1), Federal Rules of Civil Procedure, Title 28, U.S.C.A.).

In concluding the argument under this portion of the defendants' Brief, it may not be amiss to note that the basis of the plaintiffs' post trial motion in these cases, which was made pursuant to Rule 50(b) and (c) and Rule 59 of the Federal Rules of Civil Procedure, was (47a):

> "It is most strenuously urged that unless this verdict is vacated, there would be perpetuated a gross miscarriage of justice as there is no credible evidence to support the jury verdict."

As heretofore noted, District Judge Metzner took an entirely different view of the evidence. He held that the verdict of the jury in favor of the defendants was against

the weight of the evidence solely because "we cannot plot with accuracy what happened" and

> "Giving the defendants the most liberal interpretation, the whole situation was just too close, in view of the roadway at the time of the happening of the accident and the speed at which the driver [of the bus] admits he was going" (644a).

It is the contention of the defendants on this appeal that if this was the view that the District Court took of the evidence, the plaintiffs' motion should have been denied on the ground that, regardless of how close the issue of the defendants' negligence may have been, the issue was still basically and essentially one of fact for the jury.

If District Judge Metzner believed otherwise, it is submitted that he should never have submitted this issue to the jury as one of fact. Having done so and the jury having resolved this factual issue in favor of the defendants, it is further submitted that the District Court clearly exceeded the judicial discretion reposed in him by setting aside the jury's verdict on the ground stated in his decision. Either the issue of Girdwood's negligence in the operation of the bus under the conditions prevailing at the time and place of the accident was one of fact for the jury's determination or it was not. The Court's submission of this essentially factual issue to the jury and his denial of the plaintiffs' motion for judgment notwithstanding that verdict, while granting their motion to set it aside on the novel and wholly untenable ground that said issue was "just too close" for resolution by the jury, rendered the jury's function at the first trial a meaningless exercise which, it is submitted, it is not within a District Judge's power to do under the Federal Rules of Civil Procedure.

In support of their motion under Rule 50(b) and (c) and Rule 59 of the Federal Rules of Civil Procedure the defendants relied heavily on the decision of this Court in *Simblest* v. *Maynard,* 427 F. 2d 1 (2 Cir., 1970), which is as distinguishable from the cases at bar on its facts as day is from night. In that case this Court, in affirming

the ruling of the District Court for the District of Vermont, setting aside the jury verdict in favor of the plaintiff and granting the motion of the defendant for judgment *n.o.v.*, held that "the plaintiff's testimony that he did not see the fire engine's flashing red light, in the teeth of proven physical facts, we hold is tantamount to no proof at all on that issue" (p. 6).

SECOND POINT

Under the peculiar facts of this case, the District Court acted improvidently in refusing to disqualify himself from presiding at the retrial, which he himself ordered.

It is always very embarrassing to a party, and particularly to his counsel, to request a Judge to disqualify himself from presiding at the retrial of an action which he has himself ordered after setting aside a jury verdict in favor of such party—and the case at bar was no exception to this general rule. Because of the untenable ground on which the Court had set aside the verdict of the jury in favor of the defendants at the first trial, however, the defendants and their counsel naturally felt that the interests of justice required that the retrial of the actions should proceed before another Judge of the Court, whose view of the evidence adduced at the retrial, which would be substantially the same as that adduced at the first trial, would not be colored or influenced in any way by the previous ruling of the Court setting aside the jury verdict in favor of the defendants. Human nature being what it is, the defendants and their counsel were understandably concerned that if the second jury also found in their favor, District Judge Metzner might be constrained to set their verdicts aside on the same ground that he had set aside the verdicts of the jury in their favor at the first trial. They were also apprehensive that his ruling setting aside the jury's verdicts in their favor at the first trial might unconsciously color, at least to some extent, his handling of the retrial of the actions. This is not, of course, any reflection on the judicial competence and fairness of District

Judge Metzner but merely a perfectly natural concern that any defendants and their attorney placed in the position of the defendants herein prior to the retrial would normally have and which, it was hoped, the Court would appreciate. As counsel for the defendants pointed out in his affidavit in support of the defendants' motion to the Court to disqualify himself, since the proof with respect to the issue of liability at the retrial "will be virtually the same" as that adduced at the first trial, which the Court had already ruled was insufficient to support the jury's verdicts in favor of the defendants, it would seem that the retrial "could not possibly result in a final judgment in favor of the defendants" (87a), unless of course, the Court took an entirely different view of such proof at the retrial.

The defendants do not claim, and never have claimed, that District Judge Metzner would so conduct the retrial of these actions that a jury verdict in favor of the plaintiffs would result. On the contrary, their sole claim was that the Court, having already held that a verdict in favor of the defendants should be set aside on the ground heretofore discussed, might feel bound by his previous holding in this regard and that he therefore should have disqualified himself from presiding at the retrial of these actions.

The only statutory authority for the disqualification of a Judge in the Federal Courts is the one contained in Section 144 of Title 28, U.S.C.A., which makes the disqualification of a Federal Judge mandatory when a party files an affidavit charging him with "personal bias or prejudice" either against said party or in favor of any adverse party, accompanied by a certificate of counsel of record "stating that it is made in good faith", which has no application whatever in the case at bar, since there is no suggestion here that District Judge Metzner had any "personal bias or prejudice" either against the defendants or in favor of the plaintiffs.

Although this is the only statutory authority for the disqualification of a Federal Judge, the Judge himself may, in the exercise of the sound judicial discretion re-

posed in him, disqualify himself from presiding at the retrial of an action which he, himself, has ordered after setting aside a jury verdict in favor of one of the parties on essentially factual grounds. In such a case, it is submitted that, in order to allay even the slightest suspicion that he may entertain any preconceived views as to how the case should be decided by the jury at the retrial, in the interest of justice the Court should disqualify himself from presiding at the retrial.

THIRD POINT

The verdicts of the jury in favor of the plaintiffs at the retrial of these actions are excessive.

As will hereinafter be shown, on December 2, 1973, or approximately a year and a half after the accident of June 30, 1972, a hemi-laminectomy was performed on the spine of Chiarello at the Hollywood Memorial Hospital in Florida for the removal of a herniated disc at the L4-L5 intervertebral interspace, which it is claimed was caused by the accident. At the time this operation was performed it was discovered that there was a considerable amount of nerve root scarring and adhesions at this point in the patient's spine, which it is clear beyond doubt was responsible for the pain and suffering of Chiarello after the operation and his present and future pain and suffering and disability. It is the contention of the defendants under this portion of their Brief that the medical proof adduced by the plaintiffs at the retrial of these actions was insufficient to establish a proximate causal connection between this condition and the accident of June 30, 1972, and that for this reason the recoveries allowed Chiarello for his past and future loss of earnings and past and future pain and suffering and allowed his wife for her past and future loss of consortium are grossly excessive.

At the time of the trial Chiarello was 39 years of age and had a life expectancy of around 32 years (1390a). He weighed around 260 pounds and was 6 feet, 2½ inches in

height (960a) and had a history of hypertension (1105a). He was married and had three children (700a) and was employed as the superintendent of cargo loading and unloading at the Military Ocean Terminal in Bayonne, New Jersey, where he had then been employed for only a few months (683a). Prior to this, or since 1961, he had been employed first as a stevedore and then as a ship superintendent by a contract stevedoring company (961a-962a). At the time of the accident he was earning approximately $16,000 a year (1391a). At the time of the trial, however, persons doing his type of work were receiving $19,500 a year (1392a). He had formerly played tackle on his high school football team (836a).

After arriving home on the evening that the accident occurred, which was a Friday evening, Chiarello called Dr. Rothman, his family physician but Dr. Rothman was away at the time, so he went to bed and stayed there until the following Monday, when his wife drove him to the office of a Brooklyn physician named Dr. Spitz, who prescribed physical therapy for the pain he complained of in his neck and lower back and in his right shoulder, arm and hand (701a-702a). He later came under the treatment of his family physician, Dr. Rothman, who subsequently referred him to a neurosurgeon named Dr. Urs, who prescribed a brace for his neck and sent him to Saint Vincent's Hospital and the Richmond Memorial Hospital in Staten Island for physical therapy (702a-703a).

After it was later discovered that he had a herniated disc at the L4-L5 interspace, he eventually came under the care of a Florida orthopedic surgeon named Dr. Samuel Leone, who had previously trained and practiced in New York City, on August 13, 1973 (813a-814a) and on December 2, 1973, a hemi-laminectomy was performed at the L4-L5 area and the herniated disc was removed. The hemi-laminectomy was performed at the Hollywood Memorial Hospital in Florida by a Florida neurosurgeon named Dr. Gervin, who was assisted at the operation by Dr. Leone (814a-816a). Approximately 8 cc. of degenerative disc material was removed on this occasion (788a), which means that virtually

the entire disc was removed. The Hollywood Memorial Hospital record was marked into evidence at the retrial of these actions as Plaintiffs' Exhibit 6 (737a).

The plaintiffs' principal medical witness at the trial was Dr. Leone, who was brought on from Florida for the purpose of testifying (812a-876a).

On direct examination Dr. Leone testified that the operation, which he described in some detail (816a-817a), disclosed "all the components of a herniated disc of long standing" and that it also disclosed a long standing "scarring" or adhesions around the "disc area and the nerve roots coming out of the spaced area" (816a) and that there was "an abundance of scar tissue" or "root nerve" swelling at the site of the operation and that, because of this condition, he and Dr. Gervin had "doubts as to a good result" from the operation (817a-818a).

Dr. Leone testified that after the operation the patient "started to go downhill" and continued to have the same type of lower back and leg pain he had previously complained of (819a).

To alleviate this pain an electric stimulator was at first prescribed but, when this proved ineffective, a rhizotomy was performed (820a). This is a surgical procedure that destroys the nerves causing the pain and is commonly resorted to when the pain persists and cannot be eliminated in any other way (822a). Although this rhizotomy caused some reduction in the patient's pain, it did not, according to Dr. Leone, produce "a marked change in his pain" (822a).

At the time of the trial Chiarello was still under the care of Dr. Leone, who was employing rehabilitation treatments because he could not recommend further surgery in view of the scarring or adhesions in the L4-L5 area (823a), which, as the Court will see when it examines the record, it is clear is the condition that is causing Chiarello's present pain and disability. According to Dr. Leone, rehabilitation is the only thing that will help this man (823a-824a). Since two and a half years have elapsed since Chiarello has been under his treatment and he has

shown no progress, Dr. Leone does not expect any progress in the future (827a). In his opinion, Chiarello is presently unable "to perform any gainful occupation" and will be unable ever to do so (826a).

At the end of his direct examination Dr. Leone was asked the usual hypothetical question on the issue of proximate cause, which made no mention whatever of the "scarring" or "adhesions" that were found at the time of Chiarello's disc operation and is causing his present pain but referred only to the "intervertebral disc at L4-L5", which was removed on December 2, 1973, and was then asked if "in your opinion to a reasonable medical certainty is this accident [referring to the accident of June 30, 1972] a competent producing cause of the injury", and he replied, "Definitely" (826a-827a). He was then asked the following general question: "Is the disability you found Mr. Chiarello suffering with on the first examination and all the subsequent examinations and your future opinion due to the injuries he sustained in this accident?", and he replied in the affirmative (827a-828a).

It is the contention of the defendants on this appeal that the above testimony falls short of establishing a proximate causal connection between the accident of June 30, 1972, and the scarring or adhesions found by Dr. Gervin and Dr. Leone at the time the hemi-laminectomy was performed on December 2, 1973.

The testimony of Dr. Leone likewise failed to establish a proximate causal connection between the alleged impotency which Chiarello claimed resulted from the accident of June 30, 1972, and this accident. Although this alleged impotency clearly was not in the field of his specialization, Dr. Leone admitted that Chiarello had complained to him about his "impotency" and he expressed the purely personal "professional opinion" that this complaint was connected in some way "with the spinous processes involving the areas that stimulate, transmit and control the sexual functions" (821a). Unlike the opinion that he later rendered with respect to the causation of the herniated disc

(826a-827a), however, this was not an opinion that he rendered "with reasonable medical certainty".

The only other medical witnesses called by the plaintiffs at the retrial of these actions were Dr. Arthur Friedman, an orthopedic surgeon, and Dr. Lawrence I. Kaplan, a neurologist and psychiatrist, neither of whom ever treated Chiarello. Dr. Friedman saw him twice, to wit, on May 14, 1973 and again in January, 1976 (the first trial of these actions started on January 13, 1976), at the request of his attorney (751a, 763a), and Dr. Kaplan saw him only once, to wit, in January, 1976, also at the request of his attorney (1070a).

On direct examination Dr. Friedman testified that, when he examined Chiarello in 1973, he concluded that he had "a slipped or herniated disc" and that it was his opinion that "the only treatment that would be worthwhile would be an operation" for the removal of the disc (760a). When he saw Chiarello again in January, 1976, or after the herniated disc had been removed, he continued to have pain in his lower back and right leg, which required continued orthopedic and neurological treatment (765a).

As in the case of Dr. Leone, the hypothetical question asked Dr. Friedman on direct examination on the issue of proximate cause made no mention of scarring or adhesions discovered at the time of the disc operation but referred only to "a herniated or slipped disc" (779a). When Dr. Friedman was asked the very general question if he could state with reasonable medical certainty whether "the injuries the plaintiff sustained" in the accident of June 30, 1972, were "due to this accident", he testified, "Yes, they were" (779a). He was then asked if he could state with reasonable medical certainty that "the disability that plaintiff claimed to have had" and his inability to work since the date of the accident was "due to the injuries he sustained in this accident"—without specifying these injuries other than as a "herniated disc"—and he again replied, "Yes, they were" (779a).

The major portion of the direct examination of Dr. Kaplan was devoted to his own neurological findings when he examined Chiarello in January, 1976, and to explaining the operation performed at the Hollywood Memorial Hospital in Florida on December 2, 1973, as reflected in the hospital record (1070a-1090a). When he was asked to give his opinion based on the history of the case, his own neurological examination and the condition of Chiarello when he examined him in January, 1976, he testified that "It was my opinion that this patient continued to have a major problem involving his lower back with continued muscular and nerve root symptoms on both sides but especially involving the right lower extremity" and that in his opinion "This was secondary to the disc protrusion and to the multiple scarring of the epidural space and around the nerve roots which were found at the time of the operation" and that this condition was "secondary to his injury" (1090a).

Although Dr. Kaplan believed that Chiarello also had a "potency problem", he testified that "It was my feeling that this was related to his anxiety and depressive reaction", which altered his "concept of his masculinity" rather than to any nerve root trouble in the genital and paragenital area and that the potency problem therefore was "largely psychological" (1092a). He made no other attempt, however, to connect this potency problem to the accident of June 30, 1972. Since the operative report indicated that "no free fragments of disc" were "left in the epidural space"—and Dr. Kaplan testified that "The operative note is quite clear about this"—he believed that it was less likely that Chiarello's pain after the operation was caused by "a recurrent disc herniation with more of the degenerative coming out through that opening than the scar tissue" (1098a).

Finally, Dr. Kaplan was asked on direct examination if he could say with reasonable medical certainty that "the injuries that you say were caused by this accident", with-

out describing these "injuries", were "a competent producing cause of his disability", and he replied, "I would say so" (1101a-1102a). He was then asked if these injuries were "the competent producing cause of his (Chiarello's) herniated disc, the scarring and the pain that he is suffering from", and he again replied in the affirmative (1102a).

When Dr. Kaplan was confronted on cross-examination with his testimony at the first trial that he could not say for how long a period of time Chiarello had the scarring and adhesions found at the time of the disc operation on December 2, 1973, however, he testified, "I would say the same thing now." He was then asked the following crucial question: "Doctor, there is, as far as you know, no way in which you could tell how long this scarring persisted in this man's back?", and he gave the following highly significant answer: "That's correct, yes" (1118a). Dr. Kaplan frankly admitted that a condition such as this could be caused by the heavy lifting that a stevedore is required to do (1118a-1119a).

The defendants called as witness on their behalf Dr. Edward M. Gould, the neurologist and psychiatrist, who examined Chiarello on their behalf on January 12, 1976 (1150a), and Dr. Duke Barnett Baird, the orthopedic surgeon who examined him on their behalf on February 5, 1975 (1191a). As the Court will observe from a reading thereof, there is nothing in the testimony of either of these medical experts that is calculated to establish a proximate causal connection between the accident of June 30, 1972, and the scarring or adhesions found at the time that Chiarello's herniated disc was removed at the Hollywood Memorial Hospital in Florida on December 2, 1973. Dr. Gould merely testified that most of Chiarello's complaints at the time that he examined him and his reactions to the neurological tests administered to him were "nonanatomical", which means that they didn't "fit into the pattern of the nerve supply" of the areas involved

(1150a-1153a). There is likewise nothing in the testimony of Dr. Baird that is calculated to establish a causal connection between the accident of June 30, 1972, and the present complaints of Chiarello (1150a-1254a).

In response to the questions submitted to it by the Court on the damage phases of both actions, which will be found at page 1426a of the Appendix, the jury found that Chiarello's gross loss of past earnings was $55,000.00 and that his gross loss of future earnings was $507,000.00. It awarded him the gross sum of $138,500.00 for past pain and suffering and the gross sum of $230,000.00 for future pain and suffering and $10,000.00 for medical expenses. Mrs. Chiarello was awarded the gross sum of $38,000.00 for past loss of consortium and the gross sum of $70,000.00 for future loss of consortium. At the Court's request, the jury found that Chiarello's life expectancy was 32 years, that the reasonable interest on investments was 6.50 percent. per annum and that the inflation rate was 3 percent.

In view of the failure of the plaintiffs to establish with reasonable medical certainty by competent medical proof that there was a proximate causal connection between the accident of June 30, 1972, and the nerve root scarring or adhesions discovered at the time of Chiarello's disc operation on December 2, 1973, it is submitted that all of the above damage awards, with the exception of the $10,000.00 awarded for medical expenses, are grossly excessive.

CONCLUSION

The judgments appealed from should be reversed and judgments should be entered in favor of the defendants on the jury verdicts rendered in their favor at the first trial of these actions, with costs. In the event that this Court concludes that the District Court did not err in setting aside the verdicts of the jury in favor of the defendants at the first trial of these actions, however, the judgments appealed from should be reversed and a new trial should be ordered on the ground that the District Court acted improvidently in not disqualifying himself from presiding at the retrial he himself had ordered and on the further ground that the recoveries allowed the plaintiffs are excessive.

Dated: New York, New York, June 22, 1976.

Respectfully submitted,

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Attorney for Defts-appts-cr-a